JURISDICTION: **OKLAHOMA TAX COMMISSION - DECISION**
CITE: **1999-11-30-007 / NOT PRECEDENTIAL**
ID **P9600067**
DATE: **11-30-99**
DISPOSITION: **SUSTAINED**
TAX TYPE: **SALES AND WITHHOLDING**
APPEAL: **NO APPEAL TAKEN**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon review of the file and records, including the record of the hearing and the exhibits received into evidence, the undersigned finds:

FINDINGS OF FACT

1. THE OWNER owned one hundred percent (100%) of the outstanding stock of THE CORPORATION ("Corporation") and operated the business on a day to day basis. THE OWNER acquired the company from MR. ANONYMOUS.

2. THE OWNER was Protestant's friend.

3. THE OWNER suffered from prostrate cancer and was incapacitated during the periods of his chemotherapy treatments. THE OWNER died in early March, 1995.

4. The Corporation was in the business of leasing computers and computer equipment. The Corporation was a home based business operated out of the residence of THE OWNER.

5. During the periods at issue, Protestant was a custodian for COMPANY ONE and did accounting work on the side.

6. THE OWNER'S widow did not have Corporate check signing authority.

7. Protestant admits that he had Corporate check signing authority. Protestant testified that he only signed Corporate checks in emergency situations when THE OWNER was incapacitated. Protestant also testified that THE OWNER maintained physical control of the Corporate checkbook.

8. Protestant testified that he was neither an owner nor employee of the Corporation. He stated that he was not involved in the day to day operations of the company and did not have control over who got paid, when and if they got paid or how they got paid. He further testified that THE OWNER did all of the billing, collecting, depositing of funds, the sales and marketing of the company and the delivery and repossession of the computers and related equipment. He further stated that the accounting records of the business were maintained on THE OWNER'S computer system and that he did not have access to the system.

9. Protestant admitted that he did prepare sales and withholding tax reports for THE OWNER when requested by THE OWNER. He stated, however, that he was not privy to the information utilized to prepare the figures for the reports.

10. Subsequent to THE OWNER'S death, his widow operated the company for a short period of time. Protestant's signature appears on the Corporate checks used in remittance of the sales taxes for the period the company was operated by THE OWNER'S widow. THE OWNER'S widow sold the company to MR. ANONYMOUS in June or July of 1995.

11. The franchise tax report for the period of July 1, 1994 through June 30, 1995, lists Protestant as the Secretary and Treasurer of the Corporation. The report is dated December 1, 1994. It was prepared by MR. ANONYMOUS.

12. On December 6, 1995, the Division caused to be issued against Protestant proposed sales and withholding tax assessments in the total aggregate amount of $20,260.28, consisting of sales tax in the amount of $11,076.42, withholding tax in the amount of $4,406.90, interest accrued through January 9, 1996, in the amount of $2,627.59 and penalty in the amount of $2,149.37. The sales tax assessment included the periods of December, 1993 through January, 1995 and June, 1995 through October, 1995. The withholding tax assessment included the periods of January, 1994 through May, 1995 and July, 1995 through October, 1995.

13. On February 23, 1996, the Division caused to be issued against Protestant proposed sales and withholding tax assessments in the total aggregate amount of $3,224.07, consisting of sales tax in the amount of $1,900.00, withholding tax in the amount of $920.00, interest accrued through March 25, 1996, in the amount of $99.07 and penalty in the amount of $305.00. The sales tax and withholding tax assessments included the period of November, 1995 through December, 1995.

14. Protestant timely protested the proposed assessments.

ISSUE

The issue presented for decision is whether Protestant sustained his burden of proving that he was neither a "principal officer" nor "employer" of the Corporation during the relevant time period.

APPLICABLE LAW

The relevant provisions of the Oklahoma Statutes are Section 1361(A)[1] and Section 2385.3(d)[2] of Title 68. In furtherance of these provisions, Section 253 of the Uniform Tax Procedure Code, 68 O.S. 1991, § 201 et seq., provides:

> When the Oklahoma Tax Commission files a proposed assessment against corporations for unpaid sales taxes, withheld income taxes or motor fuel taxes collected pursuant to Article 5, 6 or 7 of this title, the Commission shall file such proposed assessments against the principal officers of such corporations personally liable for the tax. The principal officers of any corporation shall be liable for the payment of any tax as prescribed by this section if such officers were officers of the corporation during the period of time for which the assessment was made.
>
> The liability of a principal officer for sales tax, withheld income tax or motor fuel tax shall be determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code of 1986, as amended, or regulations promulgated pursuant to such section.[3]

The courts have developed a two prong test for imposition of the penalty under the Internal Revenue Code. *In Re Bernard*, 130 B.R. 740, 745 (Bkrtcy.W.D.La. 1991). See, *Cooke v. United States*, 796 F. Supp. 1298 (N.D. Cal. 1992) and *Feist v. United States*, 607 F.2d 954 (Ct. Cl. 1979). The first prong requires a finding that the person assessed is a "responsible person". The second prong requires the finding of a willful failure to collect, or truthfully account for, or pay over the tax.

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[1]This subsection provides in pertinent part:

> Every person required to collect any tax imposed by this article, and in the case of a corporation, each principal officer thereof, shall be personally liable for said tax.

[2]This section provides in pertinent part:

> Every employer who fails to withhold or pay to the Tax Commission any sums herein required to be withheld or paid shall be personally and individually liable therefor to the State of Oklahoma. The term "employer" ... includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer or employee ... is under a duty to act for a corporation or partnership to withhold and remit withholding taxes....

[3]Amended by Laws 1989, c.249, § 16, eff. July 1, 1989. Prior to the amendment this section provided:

> When the Oklahoma Tax Commission files a proposed assessment against corporations for unpaid sales taxes and withheld income taxes, the Commission shall file such proposed assessments against the principal officers of such corporations, if such officers are liable under the laws of Oklahoma.

The burden of proof on each issue is borne by the taxpayer. *Id*. The determination of liability under Section 253 is limited to the standards for determining who is a "responsible person". Oklahoma Tax Commission Order No. 96-12-17-037 (Prec.).

The courts have also developed standards to be utilized in determining whether each prong of the test has been satisfied. The factors considered by the courts under the first prong include the individual's status as an officer or director, the individual's duties as outlined in the corporate bylaws, the individual's ownership of shares or possession of an entrepreneurial stake in the company, the individual's role in the day-to-day management of the company, the individual's ability to hire and fire employees, the individual's authority to sign checks of the corporation and the individual's control over the financial affairs of the corporation. See, *Rizzuto v. United States*, 889 F.Supp. 698 (S.D.N.Y. 1995); *United States v. Carrigan*, 31 F.2d 130 (C.A. 3rd 1994); *Hochstein v. United States*, 900 F.2d 543 (C.A. 2nd 1990).

A proposed assessment is presumed correct and the taxpayer bears the burden of showing that it is incorrect, and in what respect. Rule 710:1-5-47 of the *Oklahoma Administrative Code*. See, *Enterprise Management Consultants, Inc. v. State ex rel. Oklahoma Tax Commission*, 768 P.2d 359 (Okl. 1988). The standard burden of proof in administrative proceedings is "preponderance of evidence." Black's Law Dictionary, 1064 (5th ed. 1979). See, *Oklahoma Tax Commission Order No.* 91-10-17-061.

CONCLUSIONS OF LAW

1. Jurisdiction over the parties and subject matter of this proceeding is vested in the Tax Commission. 68 O.S. 1991, § 207.

2. A "principal officer" or an officer or employee who is an "employer" of a corporation may be personally liable for the sales and withholding taxes of the corporation. 68 O.S. 1991, §§ 1361(A) and 2385.3(d).

3. Whether a "principal officer" or an "employer" is personally liable for the taxes of the corporation is determined in accordance with the standards for determining liability for payment of federal withholding tax pursuant to the Internal Revenue Code. 68 O.S. 1991, § 253.

4. Here, the evidence proves that Protestant was neither a "principal officer" nor "employer" of the Corporation during the relevant time period.

5. Protestant's protest to the proposed sales and withholding tax assessments should be sustained.

DISPOSITION

Based on the above and foregoing findings of fact and conclusions of law, it WAS DETERMINED that the protest of Protestant, be sustained.

OKLAHOMA TAX COMMISSION

CAVEAT: This decision was NOT deemed precedential by the Commission. This means that the legal conclusions are not generally applicable or are limited in time and/or effect. Non-precedential decisions are not considered binding upon the Commission. Thus, similar issues may be determined on a case-by-case basis.